84-473

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DANNIE R. CERTAIN, PETITIONER

V.

CITY OF HUNTSVILLE, ALABAMA, A MUNICIPAL CORPORATION, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

The City of Huntsville, Alabama, as a matter of custom and with the knowledge of its governing body, strictly enforced its police department regulations which prohibited only employees of its police department from "engaging in partisan politics" and from soliciting contributions "for partisan political reasons" and from interference "for partisan political reasons." The respondent provided no explanations nor guidelines for the regulations. The regulations violated an Alabama statute. The City did not impose any such restrictions on its other city employees. By respondent's strict enforcement of its regulations, the petitioner was not allowed to actively support and campaign for his U.S. Congressman, and was effectively prohibited from participating in any other national, state, or county

political activities. All of respondent's employees, exclusive of those of the police department, were allowed to participate in national, state, and county political activities as all other citizens of Alabama. All national, state and county officials elected in Alabama were chosen by partisan ballot, while all Huntsville municipal elections were non-partisan by virtue of an Alabama statute; therefore, the City imposed no prohibition as to any of its employees participating in its municipal politics. The questions presented are:

1. Whether respondent denied the petitioner, a police officer, equal protection of the laws under the Fourteenth Amendment of the United States Constitution?

2. Whether the respondent denied the petitioner a "liberty interest" created by the Alabama statute which

prohibited all Alabama cities from denying its employees the right to participate in county and state political activities to the same extent as any other Alabama citizen?

3. Whether the respondent's Police Department's Regulations were indefinite, overly broad and vague so as to violate rights granted the petitioner under the Fourteenth Amendment of the United States Constitution?

4. Whether the petitioner was deprived of rights protected by the due process clause of the Fourteenth Amendment as that clause incorporates the First Amendment protection of liberty of expression?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DANNIE R. CERTAIN, PETITIONER

V.

CITY OF HUNTSVILLE, ALABAMA, A MUNICIPAL CORPORATION, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

The petitioner, Dannie R. Certain, petitions for Writ of Certiorari to review and reverse the judgment of the Supreme Court of Alabama in this case.

OPINION BELOW

The opinion of the Supreme Court of Alabama (App.A, infra, 1a-25a), will be reported at ___ So.2d ___ (Ala. 1984).

JURISDICTION

The judgment and opinion of the Supreme Court of Alabama (App.A, infra, 1a-24a), was entered on April 20, 1984. A Petition for Re-hearing was denied by the Supreme Court of Alabama on June 22, 1984 (App.B., infra, 25a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

"No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The First Amendment to the United States Constitution provides in relevant part:

"Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

3. The Federal Statutory provision involved is 42 U.S.C. § 1983, which in pertinent part is as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...or other proper proceeding for redress."

4. The State of Alabama statutory provisions involved are the following:

Code of Alabama, § 17-1-7 (1983 Supp.; formerly § 11-80-6 (1975)):

> "(a)(1) No person in the employment of any city, whether classified or unclassified, shall be denied the right to participate in county and state political activities to the same extent as any other citizen of the state of Alabama, including endorsing candidates and contributing to campaigns of his choosing.
>
> "....
>
> "(4) All persons in the employment of any city, county or state shall have the right to join local political clubs and organizations, and state or national political parties.
>
> "(5) All persons in the employment of any city, county or state shall have the right to publicly support issues of public welfare, circulate petitions calling for or in support of referendums, and contribute freely to those of his choosing."

* * * * *

Code of Alabama, (1975) § 17-16-14 provides as follows:

"(b) All poll lists for primary elections shall state at the top thereof that by participating in said primary election a voter shall indicate his preference for the party holding said primary, and will support the nominees of that party in the general election, and that he is qualified under the rules of such party to vote in its primary election. No person shall be eligible to participate in said primary unless he signs said poll list and thereby certifies to the truth of said statement."

* * * * *

Code of Alabama, (1975) § 11-46-3:

"Primary elections of political parties are hereby abolished in cities and towns of this state which have a population of 300,000 inhabitants or less, according to the latest federal decennial census, and election of the members of the municipal governing body of said cities and towns shall be by and on a nonpartisan ballot in all elections held for the purpose of electing members of the governing body."

* * * * *

Code of Alabama, (1975) § 17-7-1(a), provides the following:

"The probate judge of each county shall cause to be printed on the ballots to be used in their

respective counties, the names of all the candidates who have been put in nomination by any caucus, convention, mass meeting, primary election or other assembly of any political party or faction in this state and certified in writing and filed with him not less than 60 days previous to the day of election. ...".

* * * * *

Code of Alabama, (1975) § 17-2-2, provides the following:

"General elections throughout the state shall be held for governor, lieutenant governor, attorney general, auditor, secretary of state, treasurer, commissioner of agriculture and industries, three public service commissioners, no two of whom shall be elected from the same congressional district, chief justice and associate justices of the supreme court, judges of the courts of appeals and electors for President and Vice-President of the United States, United States senators and such other officers as may be required by law to be elected by the voters of the entire state; for a member of congress in each congressional district; judges of the circuit court in each judicial circuit; judges of the district courts in each district; district attorneys in each judicial circuit, a senator in each senatorial district; a representative in the legislature in each house district; a judge of the probate court,

sheriff, clerks of the circuit courts, deputy circuit clerks in counties for which they are provided, tax assessor, tax collector, a county treasurer in counties of more than 56,000 population, as provided by law, coroner and members of the county commission in each county and constables in each precinct of the county."

5. The City of Huntsville, Alabama, Police Department Rules and Regulations read in pertinent part as follows:

"1.3.4.24 [Employees of the department may be subject to dismissal, demotion, or suspension for] engaging in partisan politics.

"....

"1.3.9.18 POLITICAL SOLICITATIONS - Members or civilian employees of the department shall not solicit contributions in money or any other manner, directly or indirectly on any pretext, to any person, committees or associations for partisan political reasons, nor shall they interfere or use the influence of their office for partisan political reasons."

STATEMENT

1. The petitioner was employed by respondent as a merit system patrol police officer from March 1, 1980, to February 4, 1982, when he was constructively discharged. Subsequent to June 4, 1980, the respondent continually subjected petitioner to its Police Department Rules and Regulations, including the following provisions:

> "1.3.4.24 [Employees of the department may be subject to dismissal, demotion, or suspension for] engaging in partisan politics.
>
> "....
>
> "1.3.9.18 POLITICAL SOLICITATIONS - Members or civilian employees of the department shall not solicit contributions in money or any other manner, directly or indirectly on any pretext, to any person, committees or associations for partisan political reasons, nor shall they interfere or use the influence of their office for partisan political reasons."

The City strictly enforced such regulations, including the above quoted

provisions, as a matter of custom with the knowledge of the governing body of the City of Huntsville, Alabama, as to its police department employees only. Violation of any police department regulation resulted in disciplinary action ranging from reprimand to dismissal. The City did not subject its other employees to such regulations. The respondent never offered the petitioner, nor the class of which he was a member, any definitive guidelines nor any explanations as to the meaning of the regulations at issue. At all times, Huntsville, Alabama, has had a population of less than 300,000 inhabitants. Consequently, its governing body has always been chosen in non-partisan elections by virtue of Code of Alabama, § 11-46-3, at page e, supra. At all times material, all national, state, and county elected officials in Alabama have been chosen by partisan

ballot. See Code of Alabama, §§ 17-7-1 and 17-2-2, at pages e-f, supra. Thus, while the respondent prohibited petitioner from participating in national, state, and county political activities, all of which were partisan, the respondent imposed no such prohibition as to its city politics, which were non-partisan.

The petitioner asserted claims under 42 U.S.C. § 1983 in the Circuit Court for Madison County, Alabama, for deprivation of rights granted under the United States Constitution and Federal Laws. Generally, his § 1983 claims were within the following two groups: (1) the City wrongfully retaliated against him (e.g., by issuing untrue and defamatory press releases concerning petitioner) on account of his having exercised his First Amendment rights (e.g., he publicly spoke out at a city council meeting on issues of public concern); (2) the City directly

infringed upon petitioner's federally protected rights by its harsh and strict enforcement of its police department regulations, (e.g. the City did not allow the petitioner to actively support and campaign for his United States Congressman). Pursuant to a general jury verdict for § 1983 claims, the state court entered a judgment in petitioner's favor for $50,077.00.

As to petitioner's § 1983 claims, the state trial court charged the jury that the above mentioned Police Department Regulations were violative of the laws and Constitution of the United States, but left it for the jury's determination as to whether the respondent had subjected the Plaintiff to an infringement or deprivation of his federally protected rights. While admitting in its opinion that "the regulations are admittedly infringements upon his rights and subject

him to treatment different from other citizens," the Alabama Supreme Court reversed the jury award in its entirety and held that the enforcement of the above Police Department Regulations did not violate any of petitioner's rights guaranteed under the United States Constitution nor federal law.

REASONS FOR GRANTING THE PETITION

The Supreme Court of Alabama has decided federal questions of great substance not heretofore specifically determined by this Court, or, in the alternative, has decided federal questions in a way which is not in accord with applicable decisions of this court.

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." Plyler v. Doe, 457 U.S. 202 (1982); reh. den. 458 U.S. 113 (1982). Why should Huntsville,

Alabama, be allowed to apply its restrictive regulations to police department employees only? Why should Huntsville, Alabama, be allowed to single out one segment of its employees for the imposition of illogical restrictions as to participation in politics? "Policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." Garrity v. New Jersey, 385 U.S. 493 (1967).

"The Equal Protection Clause imposes a requirement of some rationality in the nature of the class singled out." James v. Strange, 407 U.S. 128, 140 (1972); Rinaldi v. Yeager, 384 U.S. 305 (1966); also see concurring opinion of Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

The Huntsville regulation impinges upon the exercise of a fundamental personal right, and, thereby, the

classification must meet the test prescribed by this court in Plyler v. Doe, supra. That is, the classification must be "precisely tailored to serve a compelling governmental interest." At footnote 15 of Plyler v. Doe, supra, this Court cited Dunn v. Blumstein, 405 U.S. 330, 336 (1972), and emphasized the fundamentality of participation in state elections on an equal basis with other citizens in the jurisdiction. "This court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), at footnote 74; reh. den. 411 U.S. 959 (1973). This Court has ably pointed out the need for strict scrutiny with respect to suffrage "as arising from the significance of the franchise as the guardian of all other

rights." See Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667, (1966); Reynolds v. Sims, 377 U.S. 533, 562, (1964) reh. den. 379 U.S. 870 (1964); Yick Wo. v. Hopkins, 118 U.S. 356, 370 (1886).

Code of Alabama, 1975, § 17-16-14(b) requires that each person voting in an Alabama primary election must sign and thereby certify to "support the nominees of that party in a general election." Supporting the nominees of a political party in a general election would amount to "engaging in partisan politics" contrary to the Huntsville regulations. Thereby, the effect of the Huntsville regulation was to prohibit the class of which petitioner was a member (police department employees) from voting in any Alabama primary election. A police officer may not be required to forego his or her constitutionally protected rights simply to gain or retain the benefits of

government employment. Elrod v. Burns, 427 U.S. 347 (1976); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Pickering v. Board of Education, 391 U.S. 563 (1968).

The City fails to comply with the mandate of the Fourteenth Amendment regardless of which standard of review of the classification scheme is utilized. What reason does the City of Huntsville have for applying such an intrusive and restrictive regulation to police officers without making the same applicable to other city employees? Evans v. Cornman, 398 U.S. 419 (1970). The State of Alabama did not single out police department employees as an exception when it adopted § 17-1-7 of the Code of Alabama, 1975.

Under the Huntsville Regulations, petitioner and any employee of the Huntsville Police Department could be pressured into participating in and contributing to the campaign of the mayor,

or any city council member of Huntsville, Alabama, as the election of such officials is non-partisan. Yet, petitioner was unequivocally prohibited from supporting a candidate of his choice for Congress, for state representative, for Judge, for Justices of the Alabama Supreme Court, and for the many other elected county and state officials in Alabama, all of whom are chosen by partisan ballot. Why should Huntsville be allowed to "pick on" or "single out" police department employees and relegate them to a sub-citizen status without any important governmental objective thereby being served?

The Huntsville Police Department Regulations prohibited police officers from "engaging in partisan politics" and from soliciting contributions "to any person, committees, or associations for partisan political reasons", in contravention of the Code of Alabama,

1975, § 17-1-7. Strangely, the Huntsville Regulations impose no restrictions as to participation in City of Huntsville politics.

Municipal elections in Huntsville are non-partisan by virtue of Code of Alabama, 1975, § 11-46-3, which provides that in all municipalities having 300,000 inhabitants or less, election of members of the municipal governing body shall be on a non-partisan ballot. Such statute abolished primary elections of political parties in Huntsville as it has always had less than 300,000 inhabitants. Accordingly, the City of Huntsville did not prohibit police department employees nor their superiors from engaging in municipal politics, or from soliciting contributions for municipal political reasons, or from interferring or even from using the influence of their office for municipal political reasons. Instead,

the Huntsville regulations infringed upon the very liberty interests which were protected by state law. Code of Alabama, 1975, § 17-1-7.

Yet, the City chose to impose only on police department employees an illogical restriction as to participation in county, state and national politics. It chose to severely restrict only one segment of its employees (police department employees) from engaging in county, state and national politics (the only levels at which there were partisan politics), with absolutely no restrictions as to city politics. The City arbitrarily selected a fraction of city employees and then, in an arbitrary manner and without a reasonable correlation to any compelling public objectives of the city, made the prohibition applicable only to matters wholly outside the actual performance of such employees' duties. Huntsville

thereby effectuated an unwarranted encroachment upon the domain of individual liberty for no logical purpose. The City of Huntsville, Alabama, could impose valid restrictions, properly drafted, but the same would have to be a reasonable exercise of the power granted the City and have some just relation to the end in view. The Huntsville Regulations do not meet any aspect of such criteria.

The Hatch Act undertakes to keep the employee from being involved in politics that elects his boss. The Huntsville regulation does exactly the opposite. The Huntsville regulation prohibits police department employees from participating in non-city politics but makes no prohibition from their participation in city politics. The City cannot and has not in this case established that its classification is necessary to serve a compelling interest.

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, at 184-5 (1979). Huntsville has unnecessarily restricted the constitutionally protected liberty interest of the class of which petitioner was a member. Instead of Huntsville being able to establish that its classification is necessary to serve a compelling interest, its classification is obviously illogical and arbitrary. Illinois State Board of Elections v. Socialist Workers Party, supra.

If it desires, a state can confer extra "liberties" which the Fourteenth Amendment will then also protect against deprivations without due process, or in violation of equal protection of the laws. Upon the granting of such "liberties", the state then may not deprive a person of that liberty any more than it may deprive a person of his natural liberty, without due process of law, nor in violation of

the Equal Protection Clause. See Hewitt v. Helms, __ U.S. __, 103 S.Ct 864, 871 (1983); Vitek v. Jones, 445 U.S. 480, 489-90 (1980); Meachum v. Fano, 427 U.S. 215 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974). The State of Alabama did confer extra "liberties" by virtue of Code of Alabama, 1975, § 17-1-7 (p. d, supra). The City of Huntsville had no power to forbid the right of petitioner and his fellow police officers from engaging in county and state political activities to the same extent as other citizens of the state. Code of Alabama, § 17-1-7, supra. The City was expressly prohibited by such state statute from infringing upon petitioner's right to join political clubs, organizations, and state or national political parties. The respondent City is a political subdivision of the state and possesses only such powers as the state may have entrusted to

it. Reynolds v. Sims, supra, at p. 575. Just as we have no privileged class in Alabama, we likewise have no citizens outside the protection of the United States Constitution. Bear in mind that the more fundamental the rights on which the City encroaches, the more weighty must be the City's interest in pursuing that course of conduct. Plyler v. Doe, supra.

As is obvious from United Public Workers of America v. Mitchell,, 330 U.S. 75 (1947), and United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973), the Hatch Act was narrowly drawn to meet a specific and sufficiently grave evil. The cases approving the Hatch Act are based on needs of public administration, and the idea that it is inconsistent to require a political party coming into power to retain employees who have actively and notoriously worked for its

opponents. Yet, the Huntsville regulations do nothing to free the petitioner and the members of his class "of employer pressure to affiliate with a candidate they may personally abhor or to perform political chores in order to curry favor with their superiors rather than to act out their own beliefs." (App. A, infra, 12a.) Since the Huntsville regulations are inapplicable to municipal politics, they have no compelling public objective nor purpose to justify the admitted infringement upon petitioner's rights, including subjecting him to treatment different from other citizens and other city employees. Bullock v. Carter, 405 U.S. 134 (1972); Anderson v. Celebrezze, __ U.S.__, 103 S.Ct. 1564 (1983). The Huntsville regulations actually encourage a city political machine and provide no protection for the employees nor citizens from city politics.

The very specific and sufficiently grave evil which the Hatch Act was designed to meet is allowed and encouraged to flourish by the Huntsville regulations.

There was no attempt by respondent to provide employees such as the petitioner with any explanations, clarifications, or definitive guidelines. Regulations must be quite specific and satisfy the rule that the Constitution requires that the conflict between legislative power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict. United States v. Robel, 389 U.S. 258 (1967). One of common intelligence must necessarily guess at the meaning of the regulations at issue.

The rules prohibiting "engaging in partisan politics", soliciting contributions "for partisan political reasons" and from interference "for partisan political

reasons" violate the facial overbreadth doctrine and thereby a litigant whose own activities are unprotected may nevertheless challenge the regulation by showing that it substantially abridges First Amendment rights of other parties not before the Court. Village of Schaumburg v. Citizens, etc., 444 U.S. 620 (1980), reh. den. 445 U.S. 972 (1980).

Accordingly, the regulations which prohibited police department employees from "engaging in partisan politics", soliciting contributions "for partisan political reasons", and from interference "for partisan political reasons" fall on account of facial overbreadth, if the court is convinced that its promotion of valid governmental interests is outweighed by its damage to expressive and associational interests. See the First Amendment Overbreadth Doctrine, 83

Harv.L.Rev. 844 (1970). The City of Huntsville had no valid governmental interests in prohibiting petitioner and police department employees from "engaging in partisan politics," soliciting contributions "for partisan political reasons," and from interference "for partisan political reasons." Such regulations had the effect of prohibiting petitioner's class from engaging in county, state and national politics, while furnishing them no protection from their superiors and the governing officials of the City.

In the present case, the prohibition against engaging in partisan politics placed substantial and direct restrictions on the ability of police officers and police employees to engage in protected political expression. Yet, what interest of the City is served by such restriction which applies only to police

department employees engaging in county, state and national politics? The City of Huntsville may reasonably desire to limit all of its employees' participation in City of Huntsville political activities. But this is exactly what the City did not do. Instead, the City of Huntsville, by its prohibition against participation in partisan political activities, prohibited police officers only (to the exclusion of all other city employees) from participating in county, state and national politics. How can respondent say that the interest advanced by prohibiting police officers from engaging in partisan politics is paramount and one of vital importance? The burden was on respondent to show the existence of such an interest. This it did not even attempt in the trial of this case, and, in fact, it cannot show the existence of such an interest. There was no gain provided by such regulation to

outweigh the incurred loss of protected rights. United Public Workers v. Mitchell, 330 U.S. 75 at 96 (1947); Elrod v. Burns, 427 U.S. 347 at 370 (1976).

CONCLUSION

The Petition for Writ of Certiorari should be granted. The decision and judgment of the Supreme Court of Alabama should be reversed and the Judgment of the Circuit Court of Madison County, Alabama, reinstated and affirmed.

Respectfully submitted.

ALEXANDER, CORDER & PLUNK

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APPENDIX A

The decision and judgment of the Alabama Supreme Court is as follows:

THE STATE OF ALABAMA----JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1983-84

City of Huntsville

82-951 v.

Dannie R. Certain

Appeal from Madison Circuit Court

PER CURIAM.

Dannie Certain, a former City of Huntsville police officer, filed this action against the City and Chief of Police Sal Vizzini. He sought damages from Chief Vizzini for allegedly

defamatory statements Vizzini had made about Certain. Against the City, Certain asserted a contract claim for wages due and unpaid and a civil rights claim under 42 U.S.C. § 1983 for damages for alleged violations of his rights under the United States Constitution and federal laws. All other claims were dismissed prior to or during the trial. These counts were submitted to the jury. Verdicts were returned in favor of Chief Vizzini and against Certain on the defamation counts. These are not at issue on this appeal. The jury returned verdicts in favor of Certain and against the City on the contract count and the § 1983 claim. The City appealed from the judgment entered on these verdicts.

Following the entry of the judgment on the merits, Certain filed a motion for attorney's fees pursuant to 42 U.S.C. § 1988, which allows the prevailing

plaintiff in a § 1983 action to recover his "attorney's fees as part of the costs." This motion was outstanding at the time the City filed its notice of appeal, and the award was not made until six days after the appeal was taken.

Certain has moved to dismiss this appeal on the grounds that it is not from a final judgment. He argues that a final judgment is one which is the complete adjudication of all matters in dispute and, in the case of a judgment for damages, is a sum certain, determinable without looking at extraneous facts. Moody v. State ex rel. Payne, 351 So.2d 547 (Ala. 1977); Newpark Shipbuilding & Repair, Inc., v. Roundtree, 698 F.2d 743 (5th Cir. 1983); Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980). He contends that the final adjudication of all matters in controversy did not occur until attorney's fees were awarded, which was

after the City filed its notice of appeal; he argues that the City, therefore, appealed from a nonappealable interlocutory judgment on the merits, and that the final judgment has never been appealed.

This is contrary to a recent statement by the United States Supreme Court on this point. In White v. New Hampshire Dept. of Employment Security, 455 U.S. 445 (1982), the Supreme Court was asked to determine whether a post-judgment motion for attorney's fees under § 1988 was a "motion to alter or amend the judgment," under Federal Rule of Civil Procedure 59(e). The Court answered this question in the negative, and in a footnote added:

> "There is implicit support for this view in decisions of the Courts of Appeals holding that decisions on the merits may be 'final' and 'appealable' prior to the entry of a fee award. See e.g., Memphis Sheraton Corp. v. Kirkley,

> 614 F.2d 131, 133 (CA6 1980); Hidell v. International Diversified Investments, 520 F.2d 529, 532, n. 4 (CA7 1975); see also Obin v. District 9, Int'l Assn. of Machinists and Aerospace Workers, 651 F.2d, at 583-584. If a merits judgment is final and appealable prior to the entry of a fee award, then the remaining fee issue must be 'collateral' to the decision on the merits. Conversely, the collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgment as 'final' and 'appealable.' Obin v. District No. 9, Int'l Assn. of Machinists and Aerospace Workers, supra, at 584. Although 'piecemeal' appeals of merits and fee questions generally are undesirable, district courts have ample authority to deal with this problem."

455 U.S. at 452, n. 14.

Similarly, the Eleventh Circuit Court of Appeals in Rothenberg v. Security Management Co., 677 F.2d 64, 65 (11th Cir. 1982), held that a request for attorney's fees is a motion for costs, and noted that "[i]t is well settled in this circuit that costs may be taxed after a notice of

appeal [from a judgment on the merits] has been filed."

The final judgment in this case was entered on January 22, based on the jury verdicts. The City filed a motion for judgment notwithstanding the verdict, and then filed a timely notice of appeal within forty-two days after this motion was denied. The outstanding motion for fees did not destroy the finality of the judgment on the merits. Certain's motion to dismiss this appeal is, therefore, denied.

In the complaint, Certain made numerous allegations in support of his § 1983 claim. Generally, they can be divided into two groups. First, he alleged that the City wrongfully took action against him in retaliation for his exercise of his First Amendment rights. Second, he asserts that the City directly infringed upon rights protected by the

Constitution, laws of the United States, and state statutes. However, we need not consider any contention, made in support of the § 1983 claim, that Certain's rights secured by state law were infringed upon, because § 1983 provides a remedy for infringement of rights guaranteed by the Constitution and laws of the United States only. Baker v. McCollan, 443 U.S. 137 (1979); Croy v. Skinner, 410 F.Supp. 117 (N.D. Ga. 1976). The only state law claims, which included Certain's allegations that his rights under state law were violated, were dismissed and are not subjects of this appeal.

We begin by examining Certain's contention that the rules and regulations of the Huntsville Police Department are invalid under the United States Constitution and federal laws.

The regulations to be considered state:

"1.3.4.24 [Employees of the department may be subject to dismissal, demotion, or suspension for] engaging in partisan politics.

"....

"1.3.9.18 POLITICAL SOLICITATIONS - Members or civilian employees of the department shall not solicit contributions in money or any other manner, directly or indirectly on any pretext, to any person, committees or associations for partisan political reasons, nor shall they interfere or use the influence of their office for partisan political reasons."

Certain argues that these regulations are vague and overbroad, infringe upon his First Amendment rights, and violate the Equal Protection Clause of the United States Constitution because they deprive him of a "substantive right to participate in the electoral process equally with other voters."

This type of regulation of public employees has been challenged numerous times in the federal courts. Probably the best known case is United Public Workers

of America v. Mitchell, 330 U.S. 75 (1947), in which the United States Supreme Court upheld § 9(a) of the Hatch Act (5 U.S.C. § 7324), which made it "unlawful for any person employed in the executive branch of the Federal Government ... to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof." The Supreme Court recognized that this section interfered with a citizen's rights under the First, Ninth, and Tenth Amendments "to act as a party official or worker to further his own political views." United Public Workers of America v. Mitchell, 330 U.S. at 94. Nevertheless, it upheld the statute because the legislation "leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal

personnel deemed offensive to efficiency." 330 U.S. at 99.

> "[Furthermore,] [i]t is only partisan political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success."

330 U.S. at 100. Not only was the act not overly broad, but it was found to be a reasonable and necessary limitation to protect the integrity and competency of the government services.

The concerns of the Supreme Court have been reiterated in detail by the Fifth Circuit in Wachsman v. City of Dallas, 704 F.2d 160 (5th Cir. 1983); reh. denied, 710 F.2d 837 (1983), appeal pending in U.S. Supreme Court. Dallas city firemen and a police and fire action committee challenged a Dallas ordinance

which prohibited city employees from circulating petitions and giving, soliciting, or receiving contributions in connection with non-partisan city council elections. The ordinance also prohibited city employees from managing, or soliciting contributions for, any partisan political campaigns. These were the only provisions before the Fifth Circuit. The court held that these were constitutional restrictions on city employees. It could find no basis for judging the validity of these provisions on the basis of whether they applied to partisan or non-partisan political activities. It found that "societal" interests could be adversely affected by unrestrained partisan or non-partisan political activities by government employees. The court identified four "societal" interests:

> "[T]he interest, in an efficient government; that in a government which enjoys public confidence; that

in the right of individual citizens to be free of governmental discrimination based on their political activities or connections; and that in the right of the governmental employees to be free of employer pressure in their personal political decisions. The potential conditions which would be harmful or injurious to these important societal interests include the following three. First, the condition could exist in which 'employment and advancement in Government service' is made to 'depend on political performance' rather than on 'official effort' or 'meritorious performance.' This not only impairs the efficiency of government directly, by depriving it of the services of the more capable for the positions so affected, but also indirectly, by its adverse effects on employee morale. This condition is also injurious to the governmental employees' rights to be free of employer pressure to affiliate with a candidate that may personally abhor or 'to perform political chores in order to curry favor with their superiors rather than to act out their own beliefs.' Moreover, this condition obviously tends to undermine public confidence in government. A second harmful condition is that of governmental employees 'practicing political justice,' or exercising 'political influence ... on others,' or channeling 'governmental favor' 'through political connections.' Such a condition is seriously injurious to the rights of

> individual citizens to be free of governmental discrimination based on their political activities or connections. It also impairs public confidence in government. Governmental efficiency is also adversely affected in that governmental administration is deflected from the direct and purposeful implementation of the laws and policy choices made by those charged with that responsibility, generally the elected representatives, and is instead focused on furtherance of the political objectives of the civil servant. Third, the condition may occur under which 'the political influence of federal employees' is brought to bear without restraint 'on the electoral process,' or the governmental work force is employed to build a powerful 'political machine.' This condition undermines public confidence in government both because it tends to cast government in the light of master rather than servant of the people, and because it involves use of the governmental power for purposes other than those for which the government was instituted . The latter factor also impairs governmental efficiency in the exercises of its proper purposes."

704 F.2d at 166-167.

We hold that Regulation 1.3.4.24, which restricts the department's employees from engaging in partisan politics, and

the latter provision of Regulation 1.3.9.18, which forbids the use of the influence of the office for political reasons, are not unconstitutional violations of Certain's First Amendment rights, or of his guarantees under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. The regulations are admittedly infringements upon his rights and subject him to treatment different from other citizens. However, when tested by the standard set out in the federal cases, it cannot be denied that the purpose of the regulations is rationally related to the important governmental and societal interests discussed in the federal cases. The City has not been unreasonable in its enforcement of these provisions. There is evidence that officers who desire to assist a political campaign or candidate, or run for office

themselves, have been granted a leave of absence in order to do so, and then allowed to return to the department with no discipline or threat of discipline.

With regard to the first provision in Regulation 1.3.9.18, which prohibits the solicitation of contributions for partisan political reasons, we hold that this regulation is also constitutional.

The constitutionality of this type of regulation was first decided in Ex Parte Curtis, 106 U.S. 371 (1882). Curtis argued that a federal statute, which prohibited federal employees of the executive department "from requesting, giving to, or receiving from, any other officer or employee of the government, any money or property or other thing of value for political purposes," was unconstitutional. The Supreme Court found the statute to be necessary to avoid the possibility that employment would be

hinged upon a contribution to the "right" political candidate or party, rather than meritorious service. It reasoned that Congress had the power to regulate the political conduct of its employees so long as such regulation was necessary and reasonable. "The right to contribute money through fellow employees to advance the contributor's political theories was held not to be protected by any constitutional provision." United Public Workers of America v. Mitchell, 330 U.S. at 97, discussing Ex Parte Curtis, 106 U.S. 371.

A provision more similar to the one before us, and broader than the one considered in Curtis, was upheld in Broadrick v. Oklahoma, 413 U.S. 601 (1973). That provision stated that "[n]o employee in the classified service [i.e., no classified state civil servant] ... shall, directly or indirectly, solicit,

receive, or in any manner be concerned in soliciting or receiving any assessment or contribution for any political organization, candidacy or other political purpose." The Supreme Court upheld the statute "at least insofar as it forbids classified employees from: soliciting contributions for partisan candidates, political parties, or other partisan political purposes." Broadrick v. Oklahoma, 413 U.S. at 616. It relied on another decision handed down the same day, United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973), which upheld § 9(a) of the Hatch Act as defined what is meant in the Act by "an active part in political management or in political campaigns." For a definition, the Court in Letter Carriers referred to a list of "Prohibited Activities," which appeared in the Civil Service Regulations.

Among the forbidden activities listed was: "Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose." The Supreme Court held that this provision was a valid restriction upon federal employees and was not vague or overly broad.

The regulations are challenged only as being violative of the federal Constitution. Our decision to uphold the Huntsville Police Department regulations is based upon these federal decisions. Applying the test enunciated in those cases, we do not find that the regulations are unconstitutional or overly broad. The Supreme Court in Broadrick addressed this last point. It noted that although the Oklahoma statute regulated a substantial spectrum of conduct, the acts of which the appellants were accused were clearly

prohibited by the statute; therefore, it could not say that under those circumstances the act was overly broad. "We do not believe that § 818 [of the Oklahoma act] must be discarded in toto because some persons' arguably protected conduct may or may not be caught or chilled by the statute." Broadrick v. Oklahoma, 413 U.S. at 618.

Certain testified that he wanted to "participate in political activity," while he was on the police force, but did not do so because of the regulations. This conduct clearly may be regulated by the City. There is no evidence that he intended to do, or was disciplined under the regulation for doing, something which is constitutionally protected, and which could not be regulated by the City. Furthermore, under Broadrick, Certain has no standing to raise someone else's rights, and we, accordingly, cannot strike

down the regulations because "some other persons' protected conduct" may be infringed upon. Against the challenge made, we must uphold Regulations 1.3.9.18 and 1.3.4.24.

The City moved for directed verdict on each individual "claim within the § 1983 claim," including the claim that the above regulations were an unconstitutional infringement upon Certain's rights. This motion was denied, and all claims were submitted to the jury, which was instructed to return a general verdict on the § 1983 claim if it found for the Plaintiff. This it did. We hold that the court erred in denying the City's motion for directed verdict on the Plaintiff's claim that the Huntsville Police Department's regulations violated the federal Constitution.

In view of our holding that these regulations are <u>not</u> unconstitutional

infringements upon Certain's rights guaranteed under the United States Constitution and federal law, it was also error to deny the City's earlier motion to dismiss for failure to state a claim upon which relief could be granted. This error, however, would have been harmless had the trial court granted the City's motion for directed verdict.

Under Alabama law, if two claims for relief are submitted to a jury, one supported and one unsupported, by the evidence and the law, and the defective claim has been specifically challenged by a motion for directed verdict, a general verdict cannot stand. Ex Parte Nix, 401 so.2d 64 (Ala. 1981).

This rule of law is applicable to this case. It was error to deny the City's specific motion for directed verdict on the claim challenging the regulations under the federal Constitution

and to submit that claim to the jury. The jury may have found that the above regulations infringed upon Certain's federal rights and based its verdict on this determination. If so, the verdict is incorrect, and the judgment entered on it must be reversed. Of course, the jury may have found that one or more of the other allegations in support of the § 1983 claim were true and rendered its verdict on that basis. Because the jury returned a general verdict on the § 1983 claim, as instructed by the court, it is impossible to know whether the verdict rests upon a proper or improper basis. Because of the possibility that the jury founded its verdict upon the claim having no basis in the law, we must reverse the judgment on the § 1983 claim.

We have not ruled on any of the other allegations made in support of the § 1983 claim or the contract claim, nor does

our decision require us to do so. We reverse solely on the basis that the trial court improperly denied the City's motion to dismiss and motion for directed verdict on the claim that the regulations specifically quoted were violative of the United States Constitution and federal laws. We emphasize that we have not ruled on the validity of the regulations if challenged under Alabama law, because there was no challenge under state law. We feel compelled to note that the regulations discussed may be proscribed by § 17-1-7 of the Alabama Code (1983 Supp.; formerly § 11-80-6 (1975)):

> "(a)(1) No person in the employment of any city, whether classified or unclassified, shall be denied the right to participate in county and state political activities to the same extent as any other citizen of the state of Alabama, including endorsing candidates and contributing to campaigns of his choosing.
>
> "....

"(4) All persons in the employment of any city, county or state shall have the right to join local political clubs and organizations, and state or national political parties.

"(5) All persons in the employment of any city, county or state shall have the right to publicly support issues of public welfare, circulate petitions calling for or in support of referendums, and contribute freely to those of his choosing."

That issue, however, is not before us.

REVERSED AND REMANDED.

Torbert, C. J., Maddox, Jones, Shores and Beatty, JJ., concur.

APPENDIX B

The following is the judgment of the Alabama Supreme Court denying the petitioner's Motion for Rehearing.

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1983-84

City of Huntsville

82-951 v.

Dannie R. Certain

Appeal from Madison Circuit Court

Application for rehearing overruled. No opinion written on rehearing.

June 22, 1984

s/ Robert G. Esdale
Robert G. Esdale, Clerk
Supreme Court of Alabama